residents of the Missouri River Basin on notice that a clear purpose of the Flood Control Program includes the creation and preservation of lake recreation, Congress inserted the following directive in Section 4 of the Flood Control Act of 1944.

> The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreation purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary.

Flood Control Act of 1944, 58 Stat. 889-890 (1944); Cert. Pet. at App. 94-95.

In understanding the Act then, it is important to distinguish between River uses which pre-existed the 1944 Flood Control Act and those uses which would be created by facilities constructed under the Act. Navigation pre-existed the dams constructed, while reservoir recreation did not as there were no reservoirs. As to the former, Congress was willing to spend public funds only if such navigation became, subsequent to 1944, substantial. As to the newly created reservoirs, Congress contemplated that new uses created by the reservoirs would be "preserved and protected." 33 U.S.C. § 701-1.

This understanding of the Flood Control Act of 1944 was turned upside down by the Court of Appeals when it stated, "If, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish

and wildlife on the other, the priorities established by the FCA would forbid the abandonment of flood control or navigation." 421 F.3d at 629.

In order to ensure that newly created reservoirs are maintained for ready access by the public, the United States Corps of Engineers continues to take appropriate steps to secure recreation access, subject to protection of Tribal treaty rights and compliance with other federal laws. 36 C.F.R. § 327.1 (2005).

Over the years, the Tribes have invested some of their limited resources in enhancing the Lake Sakakawea and Lake Oahe fisheries and water access to expand lake recreation. These efforts include construction of a boat ramp at Cheyenne River that is currently thirty feet out of the water. They have contributed to a river recreation and fisheries economy that has an annual value of $87 million and is expanding, while downstream navigation peaked in 1977 and since then has continuously declined to an annual value that could be as low as $1-2 million. Cert. Pet. at 6-7.

The longer the Courts wait to give a thorough and complete construction as to how Missouri River waters are to be allocated under the Flood Control Act, the greater the pain for the Tribes who depend almost exclusively on the Missouri River, out of necessity, for clean drinking water, and who have invested so much in what they and the United States understand as a plan set forth by Congress to allocate Missouri River waters without rigidly favoring any one river use.

2. In lieu of conforming to Congress' plan, The Court of Appeals eliminated these two Congressional limitations on Upper Basin releases to support down river navigation, relying on erroneous dictum in *Etsi Pipeline Project v. Missouri* and in so erring, rendered a crippling blow to low-income Indian and non-Indian residents of the Dakotas who lost their most valuable land to Missouri River dams.

The Court's holding in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), never addressed the Tribes' rights to water supply, water access and recreation. It never addressed the appropriate allocation of water in the Missouri River between the Upper Basin citizens and governments, Indian and non-Indian, who were forced to sacrifice hundreds of thousands of acres of their best lands to largely benefit the Lower Basin.

ETSI's "navigation priority" comment relied on by the Eighth Circuit is dictum. The Supreme Court has frequently held that dictum is entitled to only the weight of its own persuasion. *E.g., Central Green Co. v. United States*, 531 U.S. 425, 430 (2001) ("The sentence that we have italicized and, in particular, the phrase 'related to flood control' has generated conflicting opinions among the Courts of Appeals. In an attempt to make sense of what is admittedly confusing dicta . . ."); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 393 (1995) ("The quoted characterization . . . was merely set forth at the beginning of the opinion, in describing the factual background of the case. It is hard to imagine weaker dictum"); *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 463 n.11 (1991) ("[O]ur remark . . . is obviously not controlling, coming as it did in an opinion

that did not present the question we decide in these cases").

As North and South Dakota have shown, the Court of Appeals chose not to analyze the Flood Control Act of 1944 by reference to the actual words used by Congress, nor by reference by the Corps of Engineers' understanding, the agency that built the dams and has managed the River for over 50 years. *See* Cert. Pet. at 22-23 (explaining the United States' consistent view that the Act did not set priorities and that navigation is not a preferred use). Instead the Court of Appeals relied, without analysis, on this Court's dictum in *ETSI Pipeline*. The Tribes have never understood *ETSI*, a dispute between the competing management functions of two federal agencies, to have constituted final and unequivocal notice to pursue lake recreation, subsistence fishing, and consumptive beneficial uses, at their own risk. They and other rural residents of what is an economically disadvantaged area of this country have reasonably relied on Congress' own words.

Accordingly, the Court should give a full and careful hearing on the actual language of the Flood Control Act of 1944, and how Congress intended to advance Upper Basin economic activities as a central component of the Missouri River dam construction program. The Court of Appeals never reached that question and this Court, having in *ETSI* unintentionally limited the inquiry of the lower courts, should undertake a careful examination of the statutory language of the 1944 flood Control Act as amended and Congress' plan for the Missouri River.

At a 1945 Senate hearing, George Gillette, Chairman from Fort Berthold, stated: "'We will gain nothing from this dam but our own destruction.'" VanDevelder, *supra*,

at 118. He was prophetic. But the Tribes have now sought to rebuild something from that which caused so much harm. They seek to recover from Missouri River fisheries some vestige of economic self-sufficiency. By developing the lakes for tourism and securing long term domestic water supplies from the River, they seek to regain some economic vitality the River once provided. Their efforts to recover from the economic destruction wrought by the dam construction and operations to date will be fruitless if the Corps is required, under a static and erroneous reading of the Flood Control Act by the Court of Appeals, to operate the River forever to preserve a downstream barge industry which never provided substantial economic benefits and today is rapidly vanishing in importance.

CONCLUSION

The Amici Indian Tribes respectfully request that the Court grant the Petition.

Respectfully submitted,

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Counsel of Record

February 14, 2006

No. 05-611

In the
SUPREME COURT OF THE UNITED STATES

State of North Dakota and
State of South Dakota
Petitioners,

v.

U.S. Army Corps of Engineers, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATE OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND STATEMENT

Missouri and petitioners North and South Dakota ("the Dakotas") have very different views of the Flood Control Act of 1944 and the substantive meaning of the Missouri River Master Water Control Manual ("Master Manual"), the rule that sets out the manner in which the United States Army Corps of Engineers ("Corps") is to manage the water system that a series of dams created from the formerly free-flowing Missouri River. The views are largely the result of the dramatically different approaches that Dakota and Missouri citizens have taken to life on the River.

In Missouri, agriculture has flourished along the River. Farmers rely on the dams to prevent flooding of their land and to provide the continuous flows that make it possible to transport bulk materials – including fertilizers and crops – inexpensively. Farmers and shippers make long-term investments premised on the Master Manual, published by the Corps to satisfy the congressional mandate embodied in the Flood Control Act. Each year, in late winter, shippers, warehousemen, and navigators enter into contracts for the delivery of goods on the Missouri River – contracts that necessarily depend on the river flows promised by the Master Manual.

While farming has flourished in Missouri, under the management of the Corps and pursuant to the Master Manual a recreation industry has flourished in the upstream states. Instead of corn and soybeans, the product is tourism revenue, produced in part by fishing for walleye, a nonnative game fish that feeds on a small forage fish, the rainbow smelt. The smelt spawns in water only inches deep along the shores of the big lakes. The Dakotas tell this Court that a multimillion dollar recreation industry hinges on this tiny minnow. Like farmers in Missouri, those establishing businesses based on walleye fishing in the Dakotas proceed with full knowledge of the Master Manual and the manner in which it requires the Corps to manage the river. And despite some recent difficulties, the Dakota businesses have obviously thrived under the Master Manual regime.

Management under that regime and the Corps' recent process to update the Master Manual have resulted in a torrent of litigation among Missouri, the Dakotas, other states, and interested parties. The issue raised by this petition was first considered in litigation commenced by the Dakotas against the Corps that ultimately involved Nebraska, Missouri, and many others. Those cases arose out of the Corps' management under the prior Master Manual.[1] The Dakotas obtained injunctions from their respective federal district courts prohibiting releases from dams situated in the Dakotas, while Nebraska obtained an injunction from its federal district court requiring the Corps to maintain downstream river flows. The Eighth Circuit consolidated those cases for review and addressed the precise issue the Dakotas present in their petition, in *South Dakota, v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied, North Dakota v Ubbelohde*, 514 U.S. 987, 124 S. Ct. 2015 (2004).

To address the claims before it in *Ubbelohde*, the Eighth Circuit first had to construe the Flood Control Act of 1944, which granted the Corps the authority to manage the Missouri River system. The court held that flood control and navigation were the dominant functions of the Flood Control Act, and ruled against the Dakotas. This Court denied the Dakotas' petition for writ of certiorari. *Id.* at 1019-20.

Subsequent to the Eighth Circuit's decision in *Ubbelohde*, a number of different parties commenced more litigation. This litigation focused primarily on the development by the Corps of the updated 2004 Master Manual. The Judicial Panel on Multidistrict Litigation consolidated these cases in the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003). Ultimately, the Corps and other federal defendants moved for summary judgment, which the district court granted. *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (2004) (Petition Appendix ("Pet. App.") at 35). That decision led to an appeal to the Eighth Circuit and the decision

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[1]The Corps has since updated the Master Manual, giving rise to the current litigation over the 2004 Master Manual.

by the Eighth Circuit targeted by this petition. Although the Dakotas attempted to revisit the issue of the proper construction of the Flood Control Act that had been decided in *Ubbelohde*, neither the district court nor court of appeals saw fit to reconsider *Ubbelohde*. Petition at 15. Instead, both courts reaffirmed the holding in *Ubbelohde*. 421 F.3d at 624 (Pet. App. at 15); 363 F. Supp. 2d at 1153 (Pet. App. at 42-43).

REASONS TO DENY THE WRIT

The Dakotas ask this Court to consider whether the Eighth Circuit in *Ubbelohde* correctly held, consistent with this Court's decision in *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988), that flood control and navigation are the "dominant functions" of the Missouri River reservoirs and that those congressional project purposes are entitled to preferential treatment over recreation, a subordinate and ancillary project purpose, in the management of the Missouri River under the Flood Control Act of 1944. This Court already declined to consider this question when it denied *certiorari* in *Ubbelohde*. Petitioners do not identify anything that would change the analysis or otherwise make this issue more appropriate for review now.

While the Eighth Circuit in this case reaffirmed the validity of *Ubbelohde*, it did so in the context of denying the motions of Nebraska, Missouri, and another party for summary judgment. 421 F.3d at 629 (Pet. App. at 15). None of these parties seek review of that decision. The court did not consider the issue in the context of any claim made by petitioners. (Pet. at 15) Nevertheless, petitioners ask this court to consider the *Ubbelohde* decision, but do not explain why that is necessary in the context of this case. There are two reasons petitioners' request should be denied.

First, even if the Court were to grant this petition and consider the holding in *Ubbelohde*, it would not change the outcome in this case. The petitioners do not argue in their petition that the Corps' balancing of interests in developing the Master Manual was improper, nor do they suggest that overruling *Ubbelohde* would

cause the Corps to revise the Master Manual or its management of the system. Any decision on this petition would be advisory only.

Second, Petitioners do not make a serious attempt to find a conflict between the decision of the Eighth Circuit and any decision by this or any lower court. Rather, the Dakotas treat this as if it were an original jurisdiction action for equitable apportionment of the Missouri River. Petition at 24; *see also* Response of Environmental Defense and National Wildlife Federation in Support of Petition for Writ of Certiorari ("Response") at 1-2. It is not.

1. Even if the holding in *Ubbelohde* were set aside, it would not change the outcome in this case. The Master Manual would still be a binding rule constraining the Corps' discretion. The petition does not challenge the Corps' balancing of interests in adopting the revised Master Manual, but only the court's holding in *Ubbelohde*. *See* Petition at13. The Eighth Circuit in this case held that the revised Master Manual was not arbitrary and capricious because "[t]he Corps' balancing of water-use interests in the 2004 Master Manual is in accordance with the [Flood Control Act]." 421 F.3d at 630 (Pet. App. at 15). There is nothing in the record to suggest - and petitioners do not argue - that the balance struck by the Corps would be any different if *Ubbelohde* were overruled. Indeed, the Eighth Circuit recognized that the impact of *Ubbelohde* on the Master Manual, if any, was prospective and hypothetical - entirely dependent on the occurrence of circumstances that might never come to pass. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 629 n.7 (8th Cir. 2005) (Pet. App. at 16). Therefore, even if this Court were to revisit *Ubbelohde* in response to this petition, the 2004 Master Manual would still govern management of the system.

Even assuming that Congress did not assign relative priorities among conflicting uses in the Flood Control Act, the Dakotas point to nothing that suggests the Eighth Circuit was wrong in leaving the balancing of competing interests to the Corps. In fact, in support of their petition, the Dakotas argue that the Corps and the Master Manual have already adopted petitioners' interpretation of the Flood Control Act. Petition at 22-23. In other words, petitioners

have as much as admitted that this Court would be providing only an advisory opinion were this petition granted.[2]

The State of Missouri does not concede, of course, that the Dakotas are right, and all uses of the River must be treated equally. Besides being impractical or impossible, that approach ignores the overall structure of the Flood Control Act. It assigned the Corps to build and operate projects the "dominant functions" of which were flood control and navigation. Projects for which the "dominant functions" would be irrigation or power production would be built and operated by the Department of Interior. On this point, both the Department of the Interior and the Corps were in complete agreement in *ETSI Pipeline*. 484 U.S. at 512, n.6-7. Of course, the system at issue is controlled by the Corps - not Interior. Consequently, the "dominant functions" of the system are flood control and navigation. That is confirmed by the declaration of policy of the Flood Control Act, where Congress explained why it was authorizing the building of these dams:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, *for navigation or flood control*, as herein authorized . . . .

33 U.S.C. § 701-1 (1944) (emphasis added).

The Dakotas' real complaint - since they are seeking to protect a recreation industry based on a fish introduced only after the reservoirs were completed - must be that the Corps does not manage the reservoirs to meet what they perceive to be the contemporary needs of the basin. If that is a valid criticism (and the State of Missouri does not suggest that it is), it is a criticism to be taken into account by the Corps as it exercises its discretion to manage the

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[2]For this same reason, the arguments made by Environmental Defense and the National Wildlife Federation at pages 4-10 of their Response in support of this petition must be rejected.

system under the constraints imposed by the 2004 Master Manual, or by Congress.[3]

The court below properly applied routine administrative law. It would be judicial activism at its worst to use this petition to revisit the holding in a prior case as a means of usurping the proper exercise of the Corps' discretion granted by Congressional act.

2. The Petition does not suggest any conflict between the decision of the Eighth Circuit and any decision of this Court. Indeed, the petition tries to distinguish this case from *ETSI Pipeline*, the case on which the Eighth Circuit predicated its decision on this issue. *See* Petition at 13, 17-19. Therefore, petitioners cannot argue that their petition should be granted because the Eighth Circuit decision conflicts with this Court's precedents.

The petition also makes no attempt to find a conflict among circuit court decisions. Indeed, there is none. No circuit other than the Eighth has addressed the setting of priorities under the Flood Control Act.

In the event that some other circuit eventually takes up the management of the Missouri River and disagrees with the Eighth Circuit, then the Dakotas or another party may seek a writ of certiorari. But until that time, this Court need not take up controversial and complex Missouri River management questions merely because the river crosses state and district lines.

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[3]In fact, the Response of Environmental Defense and National Wildlife Federation makes manifest the desire to have this Court substitute its judgment for that of Congress and the Corps. They ask this Court to declare the Flood Control Act a living document to be interpreted based on "modern economic and environmental conditions" (Response at 3), rather than on the intent of the Congress that passed the legislation. *compare* Response at 10.

CONCLUSION

For all the foregoing reasons, the Court should deny the writ.

Respectfully submitted.

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